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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

STEFANO PICCIOTTO, *et al.*,

Petitioners,

v.

ALBERT P. ZABIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether M.G.L. c. 221 § 50 violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the Supreme Judicial Court of Massachusetts ("SJC") ruling deprives Petitioners of property without due process.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are as follows:

Petitioners/Defendants/Plaintiffs-in-Counterclaim:

Stefano Picciotto as father and next friend of Athena Picciotto, a minor
Melita Picciotto

Respondents/Plaintiffs/Defendants-in-Counterclaim:

Albert P. Zabin
Schneider, Reilly, Zabin & Costello, P.C.
Edward Greer
Joel Z. Eigerman
Michael C. Gilleran
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Edwin A. McCabe
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Respondents/Defendants-in-Counterclaim:

Roche, Carens & DeGiacomo, P.C.
Michael P. Thornton, James F. Early, John T. Barrett, Robert T. Naumes, Neil T. Leifer, David J. Morris, Edwin L. Wallace, Robert M. Byrne, Jr. and David C. Strouss, as they are partners in a partnership known as Thornton, Early & Naumes

Respondent/Plaintiff:

George Richardson

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Petitioners respectfully petition for a writ of certiorari to review the ruling of the Supreme Judicial Court of the Commonwealth of Massachusetts affirming the trial court's deprivation of property without due process or to review the constitutionality of G.L. c. 221 § 50.

OPINIONS BELOW

The opinion of the SJC is reported at 433 Mass. 1007 (App. 1-2a). The opinions of the Appeals Court were not reported (App. 3a and 5a). The opinions of the Superior Court were not reported (App. 7-11a).

STATEMENT OF JURISDICTION

The judgment of the SJC was entered on February 7, 2000 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although there are further proceedings in the lower state courts still pending, since the constitutional validity of the state statute is drawn into question by the SJC's reliance on it to deprive the Petitioners of their constitutional rights, there has been a final determination of the federal issue presented sufficient to invoke the jurisdiction of 28 U.S.C. § 1257(a). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-85 (1975).

28 U.S.C. § 2403(b) may apply as this Petition calls into question the constitutionality of a statute which affects the public interest; therefore, the Attorney General of the Commonwealth of Massachusetts is being notified of this Petition contemporaneous with its filing in compliance with Rule 29.4(c) of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws, Chapter 221, Section 50:

> From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorneys' fees is otherwise expressly provided by statute.

STATEMENT OF THE CASE

This case involves the state court's depriving citizens of their property without due process, under the guise of Massachusetts General Laws Chapter 221 Section 50 (the "Statute"), which the SJC has previously construed in a constitutionally valid manner (*See Elbaum v. Sullivan*, 183 N.E.2d 712 (Mass. 1962)) contrary to its present application. The Constitution guarantees the right to property, such that any deprivation thereof requires due process of law. United States Const. Amend. V. This right was extended to protect citizens from state infringement as well. United States Const.

Amend. XIV. In the case at bar, the Petitioners have been deprived of their property without due process and, as a result, have suffered damages.[1]

The Statute confers upon "the attorney who appears for a client in [a] proceeding" a "lien for his reasonable fees and expenses upon . . . such proceeding and upon the proceeds derived therefrom." G.L. c. 221 § 50. This lien automatically attaches from the commencement of a proceeding (*See PGR Management Co., Inc. v. Credle*, 427 Mass. 636 (1998)), albeit in an unspecified amount. Consistently, the SJC has placed the burden of proving the amount of any lien to which an attorney may be entitled upon the attorney. In this case, however, the Respondents have insisted that the Statute provides for withholding the entirety of the clients' settlement until and unless the attorneys' liens have been paid in full. The trial court has applied that construction, with the approval of the Appeals Court and the SJC (App. 13-14a, 5a and 1-2a, respectively).

Having affirmed the unconstitutional application of the Statute, the SJC has brought into question the constitutional validity of the Statute itself (*i.e.*, should it be "void for vagueness" as in *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). This Court has previously determined that a statute that is susceptible to more than one interpretation, one of which is unconstitutional, may be deemed void. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The SJC ruling plainly violates the Fifth and Fourteenth Amendments to the United States

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1. The Petitioners' assertions of their federal constitutional rights were timely raised (L-25) and have been consistently preserved through each appellate level (L-15-16, L-3-4).

Constitution in addition to contradicting the SJC's prior decisions interpreting the Statute. As the Statute impacts directly on important public interests and its interpretation in the decisions below violates constitutional guarantees, the deprivation is inexcusable and unsupportable under state or federal law. These decisions also create dangerous precedent by providing unscrupulous attorneys an opportunity to extort money from their clients with the blessing of the court system and by involving the court in an individual's daily life, allowing for a flood of lien litigation. Accordingly, this Court should grant certiorari to review these important questions.

A. Material Facts

Beginning in 1983 the Petitioners' parents, with their company, Foreign Car Center, Inc. ("FCC") and certain employees (including Juan Nunez) (collectively, the "Plaintiffs") were involved in a lawsuit in which they sought compensation for personal injuries and business damages resulting from exposure to toxic airborne emissions from a nearby tannery occurring intermittently over several years. In 1993 the Plaintiffs received verdicts. Those judgments were affirmed on appeal, and, in order to evade payment, in 1996, the tannery filed bankruptcy. In the meantime, in 1994, a second suit was brought against the tannery in which the Petitioners sought compensation for their personal injuries and the loss of parental affection and support as a result of the injuries sustained by their parents. Having determined that Travelers Indemnity Company ("Travelers") had insured the tannery, in 1996 a separate action was brought against Travelers on behalf of the Plaintiffs seeking indemnity of the judgments along with punitive damages for unfair and deceptive trade practices and improper insurance settlement (G.L. c. 93A and c. 176D). In January, 1999 the Plaintiffs

and the Petitioners (at the insistence of Travelers and the tannery) settled all their claims against the tannery, Travelers and other related parties for a total of nine million dollars (the "Settlement"). The Plaintiffs and Petitioners had agreed that of that Settlement, consideration of $1,500,000 and $500,000 was for Melita Picciotto and Athena Picciotto, respectively (L-27-35), however the allocation was not expressed in the settlement agreement.

Over the years, the Plaintiffs had been represented by a series of attorneys, the Respondents herein. Each of those attorneys had withdrawn on their own request and, thereafter, filed a notice of lien seeking compensation for their alleged services.[2] The only attorneys who ever represented the Petitioners were George Richardson (who had represented Melita Picciotto and has sought approximately $10,000 in hourly fees), Michael Gilleran (who had represented both Petitioners and who submitted a bill for approximately $15,000 in hourly fees[3]), Albert Zabin (who expressly waived any fee from the Petitioners (L-43)) and Edwin McCabe, who billed the Petitioners collectively with the Plaintiffs (hereafter collectively referred to as the "Picciottos") in the underlying matter on an hourly basis (a maximum of $150,000) and waived his fees (L-61-63). The largest settlement offer any of the Respondents ever obtained on

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2. Although most states have adopted Rules or Statutes which bar *any* recovery of fees by an attorney who withdraws from representation before resolution of a matter without cause, the SJC has not yet ruled on that issue.

3. That $15,000 billing was allegedly for reviewing the evidence, evaluating the Petitioners' claims and filing proofs of claim in the Bankruptcy Court (L-37-41). The settlements to the Petitioners correspond to the proofs of claim filed by him (L-34-35).

behalf of the Picciottos was $2.5 million. In June, 1998 the Picciottos hired their present counsel, who obtained the nine million dollar Settlement.

Upon learning of the Settlement, the Respondents immediately began aggressive action to: (a) ascertain that the Picciottos received no portion of their Settlement unless they (b) were forced to pay the Respondents' unsupportable demands for fees. The hourly fees of the Respondents, as they have asserted them, total approximately $1,500,000. Three of the Respondents have claimed entitlement to contingent fee awards despite their failure to complete their contracts. As a result of the Respondents' assertion of their liens under the Statute, Travelers refused to remit the Settlement to the Picciottos as agreed; however rather than forcing the tannery out of business (which would have been the unavoidable result of failure of the Settlement as it was integral to the success of the bankruptcy reorganization), the Picciottos agreed that Travelers would commence the underlying action as an interpleader, the malpractice action already pending would be consolidated, and all of the competing claims between the Picciottos, on one hand, and the Respondents on the other, could be justly adjudicated (App. 2a).

Promptly upon the filing of the interpleader,[4] the Picciottos sought a preliminary determination (comparable to that applied for prejudgment attachment or injunction)

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4. The Respondents have suggested that due to the action having been filed as an interpleader, the funds held by the court are not the Petitioners' "property," but rather that the ownership of those funds is the ultimate question in the case. However, as those funds were the consideration for releases of valuable claims granted by the Picciottos, there is no good faith contest to the fact that they are the Picciottos' property — perhaps subject to the Respondents' liens.

of the aggregate "reasonable fees and expenses" of the Respondents and release of the balance of the Settlement. The Respondents insisted that the Statute compelled retention of the entire Settlement until the attorneys' liens were paid (App. 13a). Despite an order that the Respondents file detailed pleadings setting forth the legal justification and accounting of their fee claims (L-22), and the trial court's recognition in open court of the standard for granting a security interest under Massachusetts state law,[5] the trial court has never made any finding of likelihood of success for the Respondents. Instead, the trial court has shifted the burden to the Petitioners and their co-defendants to show a specific need for their Settlement (App. 2a), in the absence of which, the court has refused the Petitioners access to their property.

Upon the filing of the detailed pleadings, it became apparent that the only claims against the Petitioners' shares of the Settlement totalled approximately $26,000 (L-22-25). The Petitioners promptly moved for release of their portion of the Settlement with the express proviso that upon receipt of those funds, they would fully satisfy the claims against them (L-21-26). The Respondents opposed the motion asserting that: (a) they could not be bound by the allocation of the Settlement among the Picciottos; (b) the Statute required withholding the entire Settlement, even including the Petitioners' share (despite there being no claims asserted against the Petitioners); and (c) release of the Petitioners' Settlement would enable the Petitioners to assist in funding the preparation of the defenses and counterclaims against

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5. Security may issue "only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment . . ." Rule 4.1 of Mass. R. Civ. Pro.

the Respondents.[6] Again without making even preliminary findings of the Respondents' likelihood of success, the trial court refused to release more than 10% of the Petitioners' settlement, based on its perception of the Petitioners' showing of necessity (App. 8a, 10a). The Appeals Court affirmed the ruling without comment (App. 5a). The SJC expressly affirmed the transfer of the burden from the Respondents to the Petitioners (App. 1-2a). As a direct result of the unconstitutional enforcement of the Statute or the unconstitutionality of the Statute itself, the Petitioners have been deprived of their Settlement for over two years. No matter how the underlying action may ultimately be determined, it will not cure that deprivation, accomplished through violation of the Petitioners' constitutionally guaranteed rights, nor will it affect future enforcement of the Statute.

B. Stage of the Proceedings

The federal questions posed in this Petition, in terms of the findings which must be made in order for the withholding

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6. The attorneys' lien is specifically an equitable remedy to which, due to their conduct throughout these proceedings, the respondents are not entitled. Certain of the respondents have evaded identifying any particular sum to which they claim to be entitled specifically to prevent the Petitioners and their co-defendants from demonstrating the extent of their constitutional deprivations. Although their hourly charges total approximately $1,500,000, they have presented argument to the court that their fees (which exclude any fee to the attorney who settled the case) could exceed $7.5 million (App. 13-14a). However, that sum can only be reached if the Petitioners' allocation is withheld from them, the attorneys who claim contingent fees are awarded their full percentage interest, and, although the settlement was **never** paid to the Defendants but was, instead, paid directly into court, interest is charged to the Defendants at the statutory rate from the commencement of the case.

of the Petitioners' (and their co-Defendants') settlement funds to have been constitutionally justified, have been raised repeatedly from the commencement of the underlying matter in April, 1999 to the present. Included in the Lodging filed herewith are selected filings in which the federal questions have been raised (*see, e.g.*, L-3-4, L-10, L-14-16, L-18, L-20, and L-25). The question of the constitutional validity of the Statute itself arose upon the SJC's unconstitutional reinterpretation of the Statute, contrary to its prior, constitutionally valid enforcement procedure (App. 1-2a). Relevant materials are included in the Lodging and Appendix filed herewith.

REASONS FOR GRANTING THE WRIT

I. The SJC's ruling conflicts directly with its own decisions and this Court's precedent.

G.L. c. 221 § 50 (the "Statute") is a self-executing rule of law of general application. Its intentionally broad-range effect has been repeatedly upheld. The lien it grants is deemed, as a matter of law, to attach upon the "commencement" of a proceeding; and has been found to trump other liens of various origins. The SJC has previously, in interpreting the Statute, established a procedure for enforcement of the statutory lien: (1) the attorney must establish, as a matter of law, that the client owes some indebtedness and must establish the amount of that indebtedness; and (2) the attorney may then exercise the equitable remedy of reaching the proceeds of the client's cause of action to satisfy that indebtedness. *Elbaum v. Sullivan*, 344 Mass. 662, 664 (1962).

Regarding the first step, the SJC has held that it is the attorney's burden of proof that he or she is entitled to *any*

fee and that the amount he or she demands is a correct calculation of his or her entitlement. *First National Bank v. Brink*, 327 Mass. 257, 264 (1977); *Sears Roebuck & Co. v. Goldstone & Sudalter, P.C.*, 128 F.3d 10, 17 (1st Cir. 1997) (emphasis added). Furthermore, the SJC has held that "an attorney must establish a substantive contractual or quantum meruit basis to recover fees from the client as a predicate to filing a lien." *Boswell v. Zephyr Lines, Inc.*, 606 N.E.2d 1336, 1342 (Mass. 1993) (*citing Elbaum*, 344 Mass. at 664). Respondents have not established *any* indebtedness on the part of Petitioners beyond the $26,000 of their two million dollar Settlement. The trial court, the Appeals Court and the SJC have accepted Respondents' arguments that they "could be" entitled to the full Settlement (App. 13a) without any evidentiary support, in total abrogation of the burden established in *Elbaum* (App. 12-14a and 6a).

The second step in the enforcement of the Statute, previously defined by the SJC, requires the attorney to come to the court with "clean hands," as it is equitable in nature. *See Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945). This doctrine is well-settled and established in numerous SJC decisions. *See, e.g., New York, N.H. & H.R. Co. v. Pierce Coach Lines*, 183 N.E. 836 (Mass. 1933); *Pelowsky v. Silverman*, 139 N.E. 539 (Mass. 1923); *Caines v. Sawyer*, 143 N.E. 326 (Mass. 1924); *Ewald v. Ewald*, 106 N.E. 567 (Mass. 1914); *Lovejoy v. Bailey*, 101 N.E. 63 (Mass. 1913). Even were the Court to accept that the liens (without determining the amount) are legitimate, the Respondents have not come to the court with clean hands. While the evidence upon which their claims for fees are predicated and the relevant law (even giving the Respondents the benefit of every doubt) support a total recovery to the Respondents of

less than $2 million, the Respondents have maliciously and strategically manipulated retention of over $7 million to "secure" those claims. This deprivation has been inflicted with knowledge of the tremendous hardships that their former clients suffered,[7] and of the fact that their claims could not, legally or equitably, amount to a fraction of the sum they held hostage. Indeed, two of the Respondents stated, unequivocally, that they would oppose any arrangement which would permit release of any portion of the Settlement to the Petitioners or their co-defendants.[8] Even without considering the merits of the counterclaims against Respondents, the Respondents' inequitable conduct bars any

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7. The Petitioners' family was reduced to going on welfare and receiving food stamps as a result of their parents' injuries and the consequent loss of their business. They could not afford medical or dental care; their clothing was purchased at Salvation Army (Melita Picciotto is now 25 years old; Athena is 15); and the family home was under constant threat of foreclosure.

8. It must be noted that in 1996 the first malpractice action was filed against two of the Respondents. In the underlying matter, claims sounding in negligence, breach of contract, breach of fiduciary duty, abuse of process, intentional infliction of emotional distress, civil rights violations and violations of the consumer protection statute have been alleged against the Respondents. The Respondents have insisted that the Petitioners could not have access to their Settlement because it would permit them to prepare their claims for trial (disregarding the fact that the Respondents, each of whom is an individual of some substance, is defended by counsel retained by the Respondent's malpractice insurer). In contrast, due, directly to the Petitioners' property deprivation, the Petitioners and their co-defendants have been represented by one attorney throughout these proceedings. Additionally, at the Respondents' insistence, the trial court reduced by almost one-half the time usually permitted for preparation of a single malpractice action for trial.

claim for equitable relief by them. Both this Court and the SJC have ruled that conduct of the nature of that of the Respondents in this action is sufficient to rebut a claim in equity. *See Precision*, 324 U.S. at 815 (holding that "[a]ny willfull act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient . . ."); *Fisher v. Fisher*, 212 N.E.2d 222, 224 (Mass. 1965) (holding that the purpose of the clean hands doctrine is ". . . to prevent a party from benefitting by his dishonesty."). Because of the total disregard the SJC has shown for both this Court's and its own precedent, either the SJC's ruling should be overruled or the Statute should be declared unconstitutional.[9]

II. Under tests established both by the SJC and this Court, the Petitioners have been deprived of their property without due process.

"Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991) *citing Mathews v. Eldridge*, *supra*, 424 U.S. at 334 (*quoting Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (internal quotations omitted). The SJC, in determining whether there is a deprivation of property without due process, expressly adopted the test created by this Court in *Mathews v. Eldridge*, 96 S. Ct. 893 (1976). *See O'Brien's Case*, 673 N.E.2d 567, 569 (Mass. 1996). The SJC, quoting *Mathews*, lays out the considerations:

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9. ". . . the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

> The first step in that analysis is the recognition that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Beyond that [there are] three factors: First, the private interest that will be affected by the official action; second, examination of the risk of an erroneous deprivation of such interest through the procedure used . . . ; and, finally, the Government's interest . . .

O'Brien's Case, 673 N.E.2d at 569[10] (internal quotations omitted). While other standards have been used by this Court to establish deprivation of property without due process (*see, e.g., Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), it is the test set out in *Mathews* that the SJC has followed. Furthermore, this Court has repeatedly held that withholding property, regardless of classification, even temporarily, without due process creates a substantial probability of irreparable injury. *See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975) (*citing Fuentes v. Shevin*, 407 U.S. 67, 89-90 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Connecticut v. Doehr*, 111 S. Ct. 2105, 2107 (1991) (*citing Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988)). The deprivation maintained by the Massachusetts

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10. *O'Brien* is analogous to the instant case in several respects in that it, too, sought adjudication of the constitutionality of a statute on an interlocutory basis. The SJC, ruled that "[t]he question of the facial constitutionality of the provisions . . . is sufficiently serious and its resolution sufficiently important that it is prudent for us to proceed to answer it." Like the statute at issue in *O'Brien* (related to worker's compensation), the instant case has far-reaching potential to affect the public interest.

courts is particularly unconscionable in this case, because the actual irreparable injury has been demonstrated to the trial court, the Appeals Court and the SJC to no avail.

A. The private interests at stake are too significant for even temporary deprivation.

The property of which the Petitioners are being deprived is personal injury compensation. As a result of the injuries suffered by the Petitioners, they require ongoing medical care which, without their settlement, they are unable to afford. Moreover those funds are necessary for food, shelter and educational expenses (as their parents' also suffered disabling injuries the settlement for which is also being withheld from them in the underlying action). A third interest which is being severely prejudiced by even the temporary deprivation of the Petitioners' property is their ability to effectively prepare their claims and defenses against the Respondents.[11] Thus, as there are significant private interests which are being affected by the trial court's ruling, the first factor set out in *Mathews* has been met.

B. The risk of erroneous deprivation is too significant to allow the court to withhold the property without establishing a foundation.

Although the underlying matter has been in active litigation for over two years (it is scheduled to commence jury trial June 11, 2001), to date the trial court has never

11. The Respondents are attorneys and firms in active practice (with one exception) who are defended in the counterclaims by counsel retained by malpractice insurers. There are virtually unlimited resources available to the Respondents. The Petitioners and their co-defendants' **only** resource is the Settlement.

made any ruling as to what, if any, amount any of the Respondents have shown a likelihood of succeeding on the merits of their liens **or** whether the trial court recognizes the agreement among the Picciottos as to the allocation of the settlement funds.[12] The detailed pleadings required by the trial court included total billings against the Petitioners of $26,000 and no further claims were revealed through discovery; yet the trial court has used the Statute to retain $1,800,000 of the Petitioners' Settlement.[13]

Particularly in view of the self-executing feature of the Statute, and the circumstances under which it applies, there is tremendous risk of erroneous deprivation in its application. Not only does the Statute pit legal professionals against their clients but, as applied in this instance, the clients were denied the right to confront the Respondents by the trial court's excusing the Respondents from any burden of proof. That denied the Petitioners of a vital part of their due process rights. *Connecticut v. Doehr*, 111 S. Ct. at 2114 (*quoting Joint Anti-Fascist Refugee Comm. v. McGrath*, 71 S. Ct. 624, 647-49 (1951) (Frankfurter, J., concurring)). In such a

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12. It is the Picciottos' position that as a matter of law, in the absence of fraud, the Respondents have no standing to challenge the allocation agreed to at the time of settlement among the Picciottos.

13. The record provides no justification for this result. The pleadings do not assert claims against the Petitioners for more than $26,000; the pleadings do not accuse the Petitioners or their co-defendants of any fraud in allocating the Settlement; the Respondents have not provided any evidence to support any claims against Petitioners in excess of the $26,000 **or** any evidence to challenge the allocation. Yet the Petitioners, who have not challenged the $26,000 billing, have been denied their Settlement.

situation, due process must require more than merely notice and the opportunity to be heard. The purpose of the notice and hearing requirements of due process is to have the opportunity to present to the tribunal the facts and law upon which rulings may be justly made. There is the defect in this case. In view of the natural advantage of the Respondents, the notice and hearing are hollow without the consequent rulings. The trial court has failed to make the findings required by the law to support the deprivation of property it has imposed. This application of the Statute poses a tremendous risk of erroneous deprivation in this case and in future cases, if permitted to stand, especially given the complete absence of any safeguards afforded by the state to reduce that risk.[14]

C. Respondents have failed to demonstrate any countervailing interest.

As in *Connecticut v. Doehr* (111 S. Ct. at 2112), the Respondents' interests are too minimal to justify interference with the Petitioners' rights, particularly without a determination as to the likelihood of recovery. There are no exigent circumstances to support the Respondents' claims. Indeed, the Petitioners and their co-defendants consistently offered to maintain in an escrow account adequate sums to secure any reasonable recovery for the Respondents. In response, the Respondents insisted that the Statute commands that the entire settlement must be withheld; that reading is patently repugnant to the constitution. Unless the

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14. The only "safeguard," per se, is the prohibition in the Rules of Professional Conduct (Supreme Judicial Court Rule 3:07) from charging or attempting to collect an illegal or excessive fee (which only subjects a violator to potential disciplinary action which, as a practical matter, is only ever imposed for misuse of clients' funds).

Statute is to be voided for facial unconstitutionality (*See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), that application must be overruled.

In *Connecticut* at 2112, Justice White modified the third factor for consideration established in *Mathews*, because, similar to the instant case, the dispute in *Connecticut* was between private parties, rather than between a private party and the government. To accommodate that difference, Justice White revised the third prong of the test thusly: "the relevant inquiry requires . . . principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections." There is no conceivable additional burden imposed upon the government by a constitutionally valid construction of the Statute; indeed, the Statute as applied by the trial court in the case at bar, exponentially increases the burden on the government.

Assuming, *arguendo*, that the Respondents have legitimate interests in the Petitioners' Settlement, they have, thus far, failed to substantiate those interests. Had they complied with the process previously articulated by the SJC for enforcement, however, in a single motion, briefing and argument, the trial court could have made a preliminary ruling on the likely success of the Respondents, released the balance of the Settlement to the Petitioners and their co-defendants and permitted an orderly and just preparation of the case. Instead, there have been five rounds of briefing and argument before the trial court, two appeals to the Appeals Court, two petitions to the SJC and this Petition, and, in the event that further disbursements are required for the day-to-day needs of the Petitioners, further proceedings

will be required. Thus, neither the Respondents' private interests nor any foreseeable public interest would support the present application of the Statute.

All the factors identified by this Court to be considered in evaluating whether, in any particular instance, the requirements of "due process" have been satisfied unquestionably indicate that the Petitioners have been denied due process in the deprivation of their property. As the highest court of the Commonwealth has upheld that deprivation under the self-executing, "equitable" Statute, every "client" in the Commonwealth of Massachusetts is placed in peril of legally supportable (although unethical and unconstitutional) deprivations by his or her own attorney, unless the Court exercises its certiorari jurisdiction.

III. There is precedent in this Court for overruling state law that confers burdens contrary to the federal law.

While it is well-settled that ". . . state courts are the ultimate expositors of state law" (*Mullaney v. Wilbur*, 95 S. Ct. 1881, 1886 (1975) (*citing Murdock v. City of Memphis*, 20 Wall. 590 (1875); *Winters v. New York*, 333 U.S. 507 (1948)), it has shown that even a state statute may be overturned if it places a burden on a party that frustrates the goals of due process. *See, e.g.*, *Mullaney*, 95 S. Ct. at 1889; *Dickerson v. United States*, 120 S. Ct. 2326, 2333 (2000) (holding that rights conferred by *Miranda v. Arizona*, 86 S. Ct. 1602 (1966) were provided by the Constitution, and that the Fourth Circuit Court of Appeals was incorrect in reversing the Virginia state court's suppression of a confession obtained in violation of *Miranda*) (*citing Smith v. Phillips*, 102 S. Ct. 940 (1982); *Cicenia v. La Gay*, 78 S. Ct. 1297 (1958); *Mu'Min v. Virginia*, 111 S. Ct. 1899

(1991)). Although the SJC had previously properly placed the burden on Respondents to justify their alleged attorney liens (*See Elbaum*, 344 Mass. at 664 (interpreting G.L. c. 221 § 50)), in the instant case, the trial court, the Appeals Court and the SJC ignored precedent and shifted the burden to the Petitioners (App. 2a, 8a, 10a). The Statute, must, therefore, be susceptible to unconstitutional interpretation and, consequently, must be overturned.

While acknowledging that the attachment standard ought to be applied, the trial court has refused to apply it; persisting in its position that the Petitioners and their co-defendants must prove specific need for their funds in order to have **any** portion released to them. By abrogating the constitutionally valid approach to establishment of a security interest (*i.e.*, the requirement that **first**, through motion and affidavit, the party seeking the security demonstrate its likelihood of success Rule 4.1 of the Mass. R. Civ. P.), the trial court has, applying the Statute, improperly transferred the burden from the Respondents to the Petitioners. Under the circumstances, that shift constitutes a clear violation of the rights guaranteed by the Fourteenth Amendment, rendering the Statute unconstitutional.

IV. The SJC's ruling will create serious policy concerns.

Should the SJC's ruling be allowed to stand, it will create a dangerous precedent. The self-executing Statute permits unscrupulous attorneys to compel clients to pay unearned, exorbitant fees by holding the client's compensation hostage. There is ample case law in the Commonwealth decrying such a result.

> It is difficult to conceive of anything more likely to undermine public respect for the administration of justice than a wide spread suspicion that the courts are aligned in aiding the distribution among counsel of excessive proportions of the funds of those who are unfortunate enough to become involved in controversy.

Lewis v. National Shawmut Bank, 303 Mass. 187, 191 (1939) *cited in Hayden v. Hayden*, 326 Mass. 587, 596-97 (1950); *First National Bank of Boston v. Brink*, 372 Mass. 257, 270 (1977).

> When fee awards appear excessive and the public hears what has been called the soft thud of mutual backpatting, respect for the administration of justice must suffer.

Robbins v. Robbins, 19 Mass. App. Ct. 538 (1985).

> Massachusetts has established rules for the regulation of attorney's fees to protect clients and to preserve the integrity of the bar.

Sears, Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 17 (1st Cir. 1997). However, the SJC disregarded those principles in affirming the trial court's reinterpretation of the Statute. Under the regimen established in the instant case, the attorney merely must wait for the injured client to capitulate in desperation. Furthermore, this procedure exacerbates the court's burden. As in this case, the court would be subject to repeated rounds of requests, arguments and proofs based on the day-to-day exigencies of the parties. In an incredible display of overreaching, the court, with the

participation of the opponents, would maintain control over the petitioners' lives — practically taking on a quasi-conservatorship. Petitioners who could not afford the deprivation or would not tolerate the intrusion would have to surrender, thereby rewarding the attorneys' perfidy. The stated intent of the Statute is to prevent unscrupulous clients from enjoying the fruits of their counsel's labor without fair compensation. While that is a legitimate concern, there must be some balance struck between the competing interests. For the court to have to supervise disbursement of every dollar of settlements like parents doling out an allowance constitutes an impermissible and unjustifiable intrusion into the clients' privacy and the public's resources without any countervailing interest being served.

CONCLUSION

In order to prevent gross miscarriages of justice, the petition for a writ of certiorari should be granted to review the constitutionality of SJC's decision and the Statute itself.

Respectfully submitted,

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(617) 367-1200

APPENDIX

APPENDIX A — OPINION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED FEBRUARY 7, 2001

SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

SJC-08422

MELITA PICCIOTTO & another[1]

vs.

ALBERT P. ZABIN & others (No. 2).[2]

February 7, 2001.

Supreme Judicial Court, Appeal from order of single justice.

Stefano Picciotto, on behalf of Athena Picciotto, and Melita Picciotto, appeal pursuant to S.J.C. Rule 2:21, 421 Mass. 1303 (1995), from a single justice's denial of their request, under G. L. c. 211, § 3, for relief. They claim that a Superior Court judge erroneously has refused to release certain settlement funds to them.

The petitioners state that Travelers Indemnity Company, with whom the Picciottos settled all their claims, commenced

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1. Athena Picciotto, by her father and next friend, Stefano Picciotto.

2. Attorneys, law firms, and partnerships claiming to be entitled to fees from the settlement discussed above.

the present action "as an interpleader" because it decided it could not disburse the funds without risking incurring additional liability as a result of the multiple assertions of attorneys' liens. The attorney lienholders state that the Travelers Indemnity Company filed the interpleader action "at the behest of the Picciottos." The petitioners deny that it was done at their "behest," but say they "acquiesced in the interpleader alternative."

In releasing funds to specified law firms through the orders at issue, the judge indicated he was doing so because the funds were needed to support present litigation.[3] Those orders are interlocutory; we examine whether the petitioners have set forth, as rule 2:21(2) requires, "reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment . . . or by other available means." They state that "the entire settlement fund was deposited" with the court and, contend that even a temporary deprivation "of the money they need to competently present their claims, to attend the schools of their choice, [and] to enjoy even a few luxuries" is irreparable.

Nevertheless, the petitioners have not indicated why they may not seek the release of additional funds as needs arise, and why they may not obtain adequate review of the orders on appeal or by other means (e.g., at the scheduled trial). The petitioners have not met their burden under rule 2:21(2).

Judgment affirmed.

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3. The firms represent Athena, Melita, Judith, and Stefano Picciotto; Juan Nunez; and Foreign Car Center, Inc.

APPENDIX B — JUDGMENT OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY OF THE COMMONWEALTH OF MASSACHUSETTS DATED AND ENTERED OCTOBER 2, 2000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

No. SJ-2000-0345

ALBERT P. ZABIN, ESQ.; SCHNEIDER, REILLY, ZABIN & COSTELLO, P.C.; JOEL Z. EIGERMAN, ESQ.; MICHAEL C. GILLERAN, ESQ.; GILLERAN AND MORTENSEN, P.C.; PEPE & HAZARD, LLP; EDWIN A. McCABE, ESQ.; McCABE, BROWN & DAVIS, P.C.; EDWARD GREER, ESQ.; and GEORGE E. RICHARDSON, ESQ.

vs.

STEFANO PICCIOTTO, JUDITH PICCIOTTO, MELITA PICCIOTTO, ATHENA PICCIOTTO, JUAN NUNEZ and FOREIGN CAR CENTER, INC.

vs.

ROCHE, CARENS & DEGIACOMO, P.C.; MICHAEL P. THORNTON, JAMES F. EARLY, JOHN T. BARRETT, ROBERT T. NAUMES, NEIL T. LEIFER, DAVID J. MORRIS, EDWIN L. WALLACE, ROBERT M.

Appendix B

BRYNE, JR. AND DAVID C. STROUSS, as they are partners in a partnership known as THORNTON, EARLY AND NAUMES

JUDGMENT

This matter came before the Court, Greaney, J., presiding, on a petition pursuant to G. L. c. 211, s. 3. There was argument by counsel for the parties and upon consideration thereof, it is

ORDERED that the petition be, and the same hereby is, denied.

By the Court (Greaney, J.),

s/ [illegible]
Assistant Clerk

Entered: October 2, 2000

APPENDIX C — ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED AND ENTERED JUNE 8, 2000

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

00-J-332

ALBERT ZABIN, ESQUIRE & others

vs.

STEFANO PICCIOTTO & others.

ORDER

After reviewing the parties' written submissions and discerning nothing that amounts to an abuse of discretion on the part of the Superior Court judge, the petition is denied.

By the Court (Lenk, J.),

s/ [illegible]
Assistant Clerk

Entered: June 8, 2000.

APPENDIX D — ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED AND ENTERED FEBRUARY 11, 2000

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

00-J-56

ALBERT ZABIN & others

vs.

STEFANO PICCIOTTO & others.

ORDER

Upon consideration of the defendant's petition for interlocutory relief, the petition is denied in my discretion. Although it would appear that some further distribution of the funds is warranted, I decline to act in my discretion at this juncture because the defendants received a sizeable portion of the funds in August, 1999, and the motion judge's denial of the relief was without prejudice to the request being renewed upon completion of further discovery, which action does not appear to be an abuse of discretion.

By the Court (Porada, J.),

s/ [illegible]
Clerk

Entered: February 11, 2000.

APPENDIX E — THIRD ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR RELEASE OF THE FUNDS FROM THE ESCROW ACCOUNT TO ATHENA AND MELITA PICCIOTTO DATED MAY 11, 2000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

CIVIL ACTION
NO. 99-1594-A

ALBERT P. ZABIN, ESQ., ET AL.,

Plaintiffs,
Defendants-in-Counterclaim

V.

STEFANO PICCIOTTO, ET AL.,

Defendants,
Counterclaimants

THIRD ORDER FOR RELEASE OF THE FUNDS FROM THE ESCROW ACCOUNT TO ATHENA AND MELITA PICCIOTTO.

Appendix E

ORDER.

Upon consideration of the motion by the Picciotto parties [filed with opposition papers on April 24, 2000] for the release of additional funds from the escrow account maintained by the Clerk Magistrate of the Suffolk Superior Court, the court hereby *authorizes* and *directs* the Clerk Magistrate to release to the law firm of Grayer & Dilday, as attorneys for the parties Athena Picciotto and Melita Picciotto, the sum of One Hundred Thousand Dollars ($100,000.00).

The court releases these funds so that those parties may continue to be able to prepare for the trial of the present litigation and especially to engage expert witness assistance.

s/ Mitchell J. Sikora, Jr.
Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: May 11, 2000

APPENDIX F — RULINGS AND ORDERS OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS UPON THE PICCIOTTO PARTIES MOTIONS FOR DISBURSEMENT OF ADDITIONAL FUNDS FROM THE ESCROW ACCOUNT (SECOND RELEASE) DATED APRIL 26, 2000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

CIVIL ACTION
NO. 99-1594-A

ALBERT P. ZABIN, ESQ., ET AL.,

Plaintiffs,
Defendants-in-Counterclaim

V.

STEFANO PICCIOTTO, ET AL.,

Defendants,
Counterclaimants

RULINGS AND ORDERS UPON THE PICCIOTTO PARTIES MOTIONS FOR DISBURSEMENT OF ADDITIONAL FUNDS FROM THE ESCROW ACCOUNT (SECOND RELEASE).

Appendix F

RULINGS and ORDERS.

Upon consideration of all written material and oral arguments relating to the Motion to Release Further Funds from the Escrow Account dated December 30, 1999, and submitted by all six Picciotto parties (Stefano, Judith, Melita, Athena, Juan Nunez, and Foreign Car Center Inc.); relating to the Motion for Reconsideration submitted by the same Picciotto parties on or about February 16, 2000; and relating to the separate Motion for Disbursement of Funds submitted on March 3, 2000, by Athena Picciotto and Melita Picciotto, through attorney James S. Dilday; the court hereby *authorizes* and *directs* the Clerk for Civil Business of the Suffolk Superior Court to disburse from the Court-administered escrow fund created as part of the present litigation the following amounts at this time:

1. to Krulewich & Casher as attorney to Stefano and Judith Picciotto, Juan Nunez and Foreign Car Center, Inc., the sum of Two Hundred Thousand Dollars ($200,000.00); and

2. to Grayer & Dilday, as attorney to Athena and Melita Picciotto, the sum of One Hundred Thousand Dollars ($100,000.00).

Upon the basis of argument presented by the Picciotto parties, the court concludes that such amounts will be reasonably necessary for the payment of fees and expenses of the present and continuing litigation.

Appendix F

Counsel for the Picciottos should arrange with Assistant Clerk Magistrate Stephen Donovan for the orderly transfer of the escrow funds (tel. 617-788-7675).

s/ Mitchell J. Sikora, Jr.
Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: April 26, 2000

APPENDIX G — RULING OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS UPON THE PICCIOTTO PARTIES' MOTION TO RELEASE TO THE FURTHER FUNDS FROM THE ESCROW ACCOUNT DATED DECEMBER 30, 1999

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

CIVIL ACTION
No. 99-1594-A

ALBERT ZABIN, ESQ.; SCHNEIDER, REILLY, ZABIN & COSTELLO, P.C., JOEL EIGERMAN, ESQ.; MICHAEL GILLERAN, ESQ.; GILLERAN & MORTENSEN, P.C.; PEPE & HAZARD, LLP; EDWIN MCCABE, ESQ., MCCABE BROWN AND DAVIS, P.C.; EDWARD GREER, ESQ.; and GEORGE RICHARDSON, ESQ.,

Plaintiffs,

vs.

STEFANO PICCIOTTO, JUDITH PICCIOTTO, MELITA PICCIOTTO, ATHENA PICCIOTTO, JUAN NUNEZ, FOREIGN CAR CENTER, INC.,

Defendants, Counterclaimants

vs.

Appendix G

ROCHE, CARENS, DEGIACOMO, P.C., and THORNTON, EARLY & NAUMES, Partnership,

Defendants-In-Counterclaim

RULING UPON THE PICCIOTTO PARTIES' MOTION TO RELEASE TO THE FURTHER FUNDS FROM THE ESCROW ACCOUNT.

(Motion Dated August 30, 1999, and Argued at the Open-Court Status Conference of November, 1999, Brockton Courthouse)

RULING

Upon consideration of the Picciotto parties' (Picciottos, Nunez, and Foreign Auto Center, Inc.) Motion to Release Funds dated August 30, 1999, and of all supporting written materials, of all opposition papers, and of oral argument of the Motion at the open-court status conference of November, 1999, I ***DENY*** the motion at this time without prejudice to its renewal after the close of discovery.

REASONING

Certain claimant attorneys, especially attorney Albert Zabin and Schneider, Reilly, Zabin & Costello, P.C., have argued that the potential full recovery of fees, costs, and interest at the close of all litigation — trial and appellate — could consume the bulk or the entirety of the escrow fund.

Appendix G

That possibility will become much more determinable at the completion of discovery. At the present the indeterminancy of any net recovery amounts favors maintenance of the *status quo*.

s/ Mitchell J. Sikora, Jr.
Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: December 30, 1999.

APPENDIX H — RELEVANT DOCUMENTS

[Omitted here but submitted separately as Lodging]